No. 7431

United States
Circuit Court of Appeals

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

THOMAS BEE WILLIAMS,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

HONORABLE J. STANLEY WEBSTER, *Judge.*

BRIEF FOR THE APPELLANT.

JAMES M. SIMPSON,
United States Attorney.

WILL G. BEARDSLEE,
Director, Bureau of
War Risk Litigation.

WILBUR C. PICKETT,
Special Assistant to
the Attorney General.

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STATEMENT.

Thomas Bee Williams, appellee, hereinafter called plaintiff, brought suit against the United States, appellant, hereinafter called defendant, on a contract of war risk insurance. The complaint (R. 2-5) filed July 22, 1932, alleged the maturity on May 28, 1919, of a contract of insurance in the sum of $10,000 by total permanent disability as a result of pulmonary tuberculosis, chronic bronchitis, myocarditis, nervousness and neurasthenia.

The answer (R. 5-7) joined issue on the allegation of total permanent disability.

The case was tried before the Court with a jury. Plaintiff testified in his own behalf and called four lay witnesses, none of whom except his father, was shown to have known plaintiff prior to 1924, and four medical witnesses who testified as experts, none of whom examined plaintiff prior to 1930, or 1931 (R. 35, 46, 51, 55). Defendant called two medical witnesses who had examined the plaintiff in 1924 (R. 65) and in 1931 (R. 61) respectively and offered the depositions of two physicians, one of whom had known plaintiff about "ten years ago for a period of two years" (R. 73). The depositions of defendant's medical witnesses were excluded on the ground of privilege (R. 73).

The exhibits of plaintiff and defendant show that

plaintiff was treated in service for bronchitis and suspected tuberculosis. A diagnosis of active tuberculosis was shown by the exhibits to have been made shortly after plaintiff's discharge from service. Despite conduct not conducive to cure of the disease, the tuberculosis is shown to have become arrested, and to have so remained for a considerable period of time although later reactivated. The record shows that plaintiff was discharged from a Government hospital at Whipple Barracks, Arizona, for disciplinary reasons (R. 26), that he has been absent from Government hospitals without leave on other occasions (R. 26), that in one city in which he had spent considerable time he had been arrested for drunkenness "approximately twenty times" (R. 28), and the record is replete with evidence of plaintiff's drinking (R. 28, 71, 72, 21, 25, 27, 33, 34, 69, 70). A detailed resume of the evidence is set out hereinafter at pp. 6 to 18.

The case was tried in October, 1933, prior to the affirmance by the Supreme Court of *Falbo v. United States*, 291 U. S. 646, reported fully in 64 F. (2d) 948 (C.C.A. 9th).

At the close of all the evidence defendant moved for a directed verdict, in which plaintiff joined, and to the denial of said motion noted an exception (R. 75). Judgment in favor of the plaintiff, finding him totally permanently disabled from February 2,

1919, and awarding to him $57.50 per month from that date to October 2, 1933, was entered as amended December 15, 1933. Defendant's petition for appeal (R. 12) and assignment of errors (R. 13-15) were duly filed and the appeal allowed (R. 12).

QUESTIONS PRESENTED.

1. Whether there is any substantial evidence that plaintiff became totally disabled on February 2, 1919.

2. Whether the Court erred in the admission over defendant's objection and exception of testimony by witnesses qualified only as physicians, that plaintiff was totally permanently disabled.

PERTINENT STATUTES AND REGULATIONS.

The contract sued upon was issued pursuant to the provisions of the War Risk Insurance Act and insured against death or permanent and total disability (40 Stat. 409).

Section 13 of the War Risk Insurance Act (40 Stat. 555) provided that the Director of the Bureau of War Risk Insurance—

> "shall administer, execute and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regula-

> tions not inconsistent with the provisions of this Act necessary or appropriate to carry out its purposes."

Pursuant to this authority there was promulgated on March 9, 1918, Treasury Decision No. 20, reading:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed. * * * to be total disability.
>
> "Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *"

ASSIGNMENT OF ERRORS.

(R. 13-14)

I.

The Court erred in denying defendant's motion at the close of plaintiff's case, for a verdict in defendant's favor, or, in the alternative, for a nonsuit, on the ground and for the reason that the evidence adduced by and on behalf of plaintiff did not establish a prima facie case, and was insufficient to support a verdict, and on the further ground that there was no proof of any permanent and total disability occurring while the contract of insurance was kept in force and effect by the payment of the stipu-

lated monthly premium thereon, and on the further ground that the evidence affirmatively showed that plaintiff was not permanently or totally disabled, to which denial the defendant took exception at the time of the interposition of said motion herein.

II.

The Court erred in denying defendant's motion, at the close of all the evidence, for a directed verdict, upon the grounds and for the reason that the evidence adduced did not prove plaintiff to be permanently and totally disabled from following a gainful occupation during the time that his policy was in force and effect; and upon the further ground that the evidence affirmatively showed that the plaintiff was not permanently and totally disabled during the period that the policy sued upon was in force and effect, to which denial the defendant took exception.

III.

The Court erred in excluding from the evidence the depositions of Dr. C. O. Decker and Dr. Paul J. Dailey, which depositions were offered on behalf of defendant, to which ruling defendant excepted and exception was allowed.

IV.

The Court erred in denying the objection of de-

fendant to the testimony of experts as to the ultimate facts, to which ruling defendant excepted and exception was allowed.

V.

The Court erred in entering judgment in favor of the plaintiff herein, as the evidence was insufficient to sustain a judgment.

RESUME OF THE EVIDENCE.

Before service plaintiff was a laborer following kitchen work considerably. He testified that he worked steadily before service. He had a sixth grade education. After service on the Mexican border he was mustered into Federal service and in November, 1917, was granted a policy of war risk insurance (R. 16). At the front in France he waded in mud often without change of clothing, was under fire and was rendered nervous by the near explosion of a shell. He testified that he contracted a severe cough, ran a fever, began to lose weight, was sent to a hospital and remained in the hospital and a convalescent camp for several months. He testified that he continued to lose weight, had a poor appetite, vomited, had pains in his chest, ran a fever, became nervous and coughed constantly (R. 18). He returned to the United States February 2, 1919. He was sick on the boat and spent thirty days in a camp hospital. He testified he was in a tuberculosis ward

in another hospital for a time not stated. He was discharged May 28, 1919. He worked for a construction company for eight days and a cafe for a week or ten days and left each job because of illness. He was examined and sent to a tuberculosis sanitarium in Portland (R. 18) for forty days. In January, 1920, he was sent to a hospital in Palo Alto, California, and transferred to a hospital at Whipple Barracks, Arizona, spending two months in each. He was discharged from the latter hospital and worked on a public highway for fifteen days (R. 19). He left this employment and another job with a lumber company after thirty days because of sickness and inability to work. In 1921, he was in two government hospitals for a few days each time. For a year he did nothing. He had married in 1920 (R. 27) and in December, 1923, moved his family from Wisconsin to Yakima, Washington. He worked for a lumber company for two weeks but quit because of his condition (R. 20). He drank liquor at that time but testified that it had nothing to do with his sickness or loss of employment. He was in a government hospital several times in 1924 and 1925, and testified that a diagnosis of active tuberculosis was made by the hospital in 1924 (R. 21). He testified that he worked at several jobs for short periods and quit each of them because of his condition. He spent a few days in a Soldiers' Hospital and was transferred to the Soldiers' Home

(R. 22). He testified that he worked for brief intervals at various jobs until 1931 and quit each of them because of his condition (R. 23-24). Since 1931, he has worked twice for brief periods (R. 24). He testified that he had been treated by several physicians (R. 24) and that he has been in numerous government hospitals for brief intervals (R. 23).

He testified that he is still losing weight, has night sweats, coughs, raising mucous and often blood, has pains in chest and fever, is nervous and sleeps hardly at all, that his heart bothers him. His present weight of 145 pounds is four and one-half pounds under his weight at enlistment in service, although in the army he reached a weight of 167 or 170 pounds (R. 24).

He testified that he drinks occasionally and has done so since 1920; that he has nervous convulsions whether he drinks or not (R. 25).

On cross examination plaintiff testified in reference to hospitalization at Whipple Barracks, Arizona in 1919:

> Q. You had some trouble down there and you were discharged for being drunk, weren't you?
>
> A. That was the charge, yes. (R. 26).

He testified that he became absent without leave

from a Government hospital in Tennessee in 1921, from the government hospital in Walla Walla in 1924 (R. 26) and again in 1925 (R. 27); that he had been in jail for drunkenness at different times and had been arrested for drunkenness at Yakima approximately twenty times (R 28).

He testified that he had claimed and received an allowance for wages lost in reporting to Government institutions for physical examination; that he was placed in vocational training in 1922 or 1923 and "quit of his own accord" after seventeen or eighteen days (R. 28).

Plaintiff's Exhibit 2, which was admitted in evidence, which is a report of a physical examination made by Dr. Pierce, discloses a diagnosis of deep peribronchial tuberculosis with loss of strength and neurasthenia, giving the prognosis, however, as good. The service records or records known as the Adjutant General's office file, plaintiff's Exhibit No. 1, discloses that the assured had bronchitis, heart trouble and a venereal disease prior to his muster into the Federal service and before the issuance of his war risk insurance contract, which is the basis of the present suit. It likewise discloses that he had since childhood a number of diseases and had always been in a rather sickly and weakened condition, all of which was shown to exist before his induction into the Federal service.

Elmer Day testified that plaintiff worked for him for eight or ten days in 1924 or 1925; that plaintiff appeared weak, coughed a little and quit work; that he saw plaintiff in bed the next day when he had a slight hemorrhage and spat blood in a waste paper basket (R. 30).

Fred Jackson testified that he operated an orchard; that plaintiff worked for him in 1924 and 1931; that plaintiff complained of his lungs and witness had seen him spit blood; that plaintiff would do his share of work for three days or a week and quit; that he imagined had plaintiff stayed with him there would have been available three years of work between 1924 and 1931 (R. 32-33).

Plaintiff's father testified that plaintiff did not look well just before discharge from service; that he had seen plaintiff often since he moved to Yakima (December, 1923—R. 20); that plaintiff drank some; was nervous and would go into convulsions; that plaintiff would work a little and have to lay off; that he was unable to stand anything (R. 34).

Dr. Duncan testified that he had examined plaintiff "two or three weeks prior to the trial" and once "two or three years prior to the trial". He examined plaintiff for the purposes of the trial, took a history from plaintiff and took the history into account in making his diagnosis (R. 35).

In the opinion of the witness "plaintiff was suffering from a chronic tubercular condition; that it was in an advanced stage, but not active at the present time; that he prescribed that the plaintiff should not work at hard labor or expose himself and should live a quiet, easy life; that rest is essential at all times in the treatment of tuberculosis; that labor would aggravate his condition; that, in his opinion, the man should never engage in hard labor; that he couldn't engage in work of any kind continuously." (R. 36).

In response to a hypothetical question (R. 36-40) from which was omitted any reference to plaintiff's neglect of his condition as shown by his own testimony of absences without leave from Government hospitals, drunkenness and arrests for drunkenness, the witness was permitted to testify over defendant's specific objection, to an opinion that plaintiff was "totally and permanently disabled from the date of his separation from the service" (R. 40).

The witness believed—

> that a case of incipient tuberculosis could be absolutely cured, but that in the case of plaintiff, he believed that a permanent arrest was not possible, and that while plaintiff's tuberculosis might be arrested for a time, it would break down with fatigue and become active and be so throughout the man's life. (R. 40-41).

The witness thought tuberculosis could be ar-

rested but not absolutely cured; that when "an arrested case of tuberculosis flared up, that the patient was out of luck" (R. 42); that arrested tuberculosis acts as a vaccination against subsequent attacks "to a great extent" perhaps accounting for some degree of immunity in the white race (R. 43); that "the effect of heavy drinking on a tubercular patient would be adverse; but that a moderate use of alcohol would be beneficial; that he could not remember the date of his first examination; that he kept no office notes and that the only treatment he recommended was that plaintiff take life easy" (R. 44).

Dr. J. L. McDonald examined plaintiff October 5, 1933, diagnosed "tuberculosis, moderately advanced in both lungs" for which he prescribed dry climate, mental and physical rest. For plaintiff to engage continuously in any kind of work would be injurious to his health and that his condition was reasonably certain to last throughout his lifetime. In response to the same hypothetical question asked Dr. Duncan (R. 36-40) the witness was permitted to testify, over the same objection previously interposed by defendant, to an opinion that plaintiff was "totally and permanently disabled at the date of his separation from the service on May 28, 1919." (R. 47).

On cross examination the witness testified that he had—

appeared as a witness in a number of war risk

> insurance cases; that the fee he was to receive for his testimony was contingent upon plaintiff winning the case and that he would not come into court for less than a fee of $250. (R. 47).

In response to a question of the Court the witness reported his findings as to plaintiff's condition as "moderately advanced tuberculosis, possibly active." (R. 49).

Dr. Storgaard examined plaintiff first in 1931, and treated him for pleurisy. He had examined plaintiff several times since, making a diagnosis of "chronic, moderately advanced, pulmonary tuberculosis, pleurisy and cardiac hypertrophy" (R. 51). He considered plaintiff unable to engage in any kind of labor continuously and the disability reasonably certain to last throughout life. In response to the same hypothetical question asked Dr. Duncan (R. 36-40) the witness was permitted to testify over defendant's objections to an opinion that plaintiff was "totally and permanently disabled at the date of his discharge from the United States Army May 28, 1919" (R. 52).

On cross examination the witness testified that he was "charging the plaintiff for his testimony whatever the plaintiff chose to pay; that he found the plaintiff's tuberculosis in 1931 active; that he had no record of his examinations; that his files and records had been lost and he was testifying from memory absolutely" (R. 53).

Dr. Tracy testified that he first examined plaintiff in August, 1931, and examined him again a few days before the trial; that he made a complete mental and nervous examination and concluded that plaintiff "was suffering from asthenia which means a general weakening of the greater muscular physical system" (R. 55); that asthenia is a nervous condition associated with neurasthenia which is a permanent condition; that "even without tuberculosis plaintiff would not be able to work" (R. 56). The witness was asked the same hypothetical question asked Dr. Duncan (R. 36-40) and over the same objections was permitted to testify to an opinion that plaintiff was "totally and permanently disabled at the date of his separation from the service May 28, 1919" (R. 57).

On cross examination the witness testified that he had—

> testified as an expert witness in a large number of war risk insurance cases; maybe 15 or 20; that he had made no particular arrangements about his fee for testifying in this case; that he did have an understanding that he would be paid a reasonable fee for his services and that his fee in the case was to be contingent upon the winning of the suit (R. 57);

that he "would expect at least $300.00 as a fee"; that at the present time he was practicing in Seattle "but I haven't had an office in Seattle for a period of about two years * * * I have been taking

care of regular cases, and acting as expert witness'' (R. 58).

The witness further testified—

> that the long continued use of alcohol might affect plaintiff's stomach and might affect him mentally, but that it didn't have an adverse affect on a man's nervous system; that undoubtedly one of the best treatments for a neurasthenic patient was to give him a drink occasionally. * * * that ordinarily a nervous person required but little liquor to become intoxicated, but that in his opinion nothing that plaintiff could have done would have changed his condition of total and permanent disability after he was discharged from the army. (R. 59-60).

Defendant called Dr. Feaman who had examined plaintiff August 11, 1931, and found ''pulmonary tuberculosis, chronic, moderately advanced, healed, with chronic bronchitis, moderate * * * no evidence of active tuberculosis'' (R. 61-62). The witness thought that there were ''many occupations (plaintiff) could follow and which would very much improve his mental attitude'' (R. 63).

On cross examination the witness testified that excessive use of liquor would have a bad effect on any chronic disability; that work would reactivate tuberculosis but that a person with arrested tuberculosis could engage in light labor, could drive a taxicab in Seattle; that chronic neurasthenia might be

detrimental to one suffering from tuberculosis. (R. 64).

Defendant's witness, Dr. Tollefson, examined plaintiff in February, 1924, making a chest examination only and finding nothing to indicate the presence of tuberculosis (R. 65); "There was no clinical evidence of pulmonary condition—pulmonary tuberculosis" (R. 66). The witness testified that a man with active tuberculosis could not work but that "if not active he may be far advanced * * * and still be able to work" (R. 67).

Harry Telfer saw plaintiff a great many times during the years 1925 to 1927; that "the said Williams * * * had no physical or mental disability in so far as the said Telfer observed, except that * * * when * * * Williams was under the influence of alcoholic beverages; that Williams during * * * 1925 to 1927 was frequently intoxicated" (R. 68-69).

"Richard Snyder * * * comptroller of the Forest Lumber Company at Elcho, Wisconsin * * * during * * * 1925 to 1927 * * * was well * * * acquainted with the plaintiff, Thomas Bee Williams * * * and * * * observed no mental or physical disability of the plaintiff * * except * * * when * * * Williams was under the influence of intoxicating liquors, which was on

a great many occasions." To the same effect were the observations of Nick Visser (R. 69-70).

R. D. Lang, police officer of Yakima, testified that he had known plaintiff since 1928; recalled having arrested him and had observed him on the streets. The witness testified:

> "Generally when I noticed him he would be under the influence of liquor, or partially under the control of liquor" (R. 71).

H. W. Hanson testified by deposition that he had known plaintiff about ten years; that "from his observation plaintiff seemed to be a very heavy drinker and he had seen him under the influence of liquor several times"; that "I never observed any physical disability"; and that "plaintiff's reputation for sobriety in the community wasn't good" (R. 72).

The deposition of Dr. C. O. Decker who had "known plaintiff about ten years ago for a period of two years or better, shortly after the war" and who had "examined the plaintiff" was excluded on plaintiff's objection "on the ground of privilege existing between a doctor and his patient" (R. 73), and the material parts of the deposition of Dr. Dailey were excluded upon the same ground (R. 74), although there was admitted the testimony of Dr. Dailey that plaintiff is "a very unreliable man and has a poor reputation for veracity". (R. 74.)

With the exhibits the foregoing constitutes the substance of all the evidence adduced at the trial.

In connection with the assured's voluntary relinquishment of the training facilities afforded him by the Government, and in connection likewise with his failure to prove an effort or lack of ability to fit himself for a more remunerative position requiring less manual labor than that to which he was ordinarily accustomed, the attention of this Court is directed to the case of Proechel v. United States, 59 Fed. (2), 648, in which it was held that the burden rested upon the plaintiff of showing a lack of physical or mental capacity to acquire such training as would fit him for some lucrative employment.

In the Proechel case the Court of Appeals for the Eighth Circuit stated as follows, in its opinion:

> By way of illustration, let us suppose two youths entered the military service. They were mentally equally endowed, had only a grade school education, and with no experience except as farm hands. Each contracted a disease that resulted in the permanent ankylosis of the joints of his ankles so that no longer could he do a farmer's work. Opportunity for training for other work was offered them. One grasped that opportunity and made of himself a lawyer. The other rejected the opportunity, perhaps (as within common knowledge many times has happened) fearing he would overcome his handicap and so lose the privilege he prizes of living without toil. The first wished to and did

overcome the handicap of ankylosis. The second cherished and preserved it as capital from which through life he might draw dividends. Both had contracts of war risk insurance. The first certainly cannot prove that by reason of his handicap it is now impossible for him continuously to carry on a substantially gainful employment. All the second could prove is that, by reason of his handicap and his refusal to overcome it, it is now impossible for him to earn a living by his own efforts in any trade or occupation. The second can no more make out a case than could the first.

When the reliance of an insured is on a disease of the body of such a nature as that it does not necessarily disqualify him permanently for all occupations whatever, it is competent for him to prove his lack of experience, schooling, and training as having relevancy to his ability to carry on any substantial gainful occupation, but he has the burden also of showing either lack of mental capacity or of opportunity or of both to acquire such training as would fit him for some reasonably remunerative employment.

POINTS AND AUTHORITIES

I.

THERE IS NO SUBSTSANTIAL EVIDENCE OF THE PERMANENCE ON FEBRUARY 2, 1919, OF ANY TOTAL DISABILITY THEN EXISTING.

Falbo v. United States, 64 F. (2d), 948 (C. C. A. 9th).
Affirmed, 291 U. S. 646.

United States v. Lumbra, 63 F. (2d), 796 (C. C. A. 2nd).
Affirmed, 290 U. S. 551.

United States v. Rentfrow, 60 F. (2d), 488 (C. C. A. 10th).

II.

THE COURT ERRED IN THE ADMISSION OF TESTIMONY BY WITNESSES QUALIFIED ONLY AS PHYSICIANS THAT PLAINTIFF WAS TOTALLY PERMANENTLY DISABLED.

United States v. Sauls, 65 F. (2d), 886 (C. C. A. 4th);

Prevette v. United States, 68 F. (2d), 112 (C. C. A. 4th);

Miller v. United States, decided June 8, 1934 (C. C. A. 5th);

United States v. Matory, decided June 21, 1934 (C. C. A. 7th);

Harris v. United States, 70 F. (2d), 889 (C. C. A. 4th).

ARGUMENT

THERE IS NO SUBSTANTIAL EVIDENCE OF THE PERMANENCE OF TOTAL DISABILITY.

The affirmance by the Supreme Court in a per

curiam opinion (291 U. S. 646) in *Falbo v. United States*, 64 F. (2d), 948 (C. C. A. 9th) definitely established the requirement in war risk insurance cases of substantial evidence of total diability occurring during the life of the contract and then reasonably certain to be permanent during lifetime. *United States v. McCreary*, 61 F. (2d), 804 (C. C. A. 9th).

Plaintiff's case is legally deficient for the want of any substantial evidence of the permanence of total disability, a burden "not carried by leaving the matter in the realm of speculation". *United States v. Rentfrow*, 60 Fed. (2d), 488 (C. C. A. 10th).

Plaintiff introduced no factual medical testimony concerning his physical condition prior to 1930, or 1931 (R. 35, 46, 51, 55) and successfully excluded, on the ground of privilege, the depositions of two physicians, at least one of whom had "known plaintiff about ten years ago for a period of two years" (R. 73). The strongest evidence in support of the plaintiff's claim is the record in service of chronic bronchitis and suspected incipient pulmonary tuberculosis (Plaintiff's Exhibit 1) and the diagnosis of activity of tuberculosis within a short time after discharge (Plaintiff's Exhibit 2).

The authorities have recognized incipient tuberculosis as a condition requiring rest and treatment and, therefore, totally disabling (*Nicolay v. United*

States, 51 F. (2d), 170 (C. C. A. 10th); *Eggen v. United States,* 58 F. (2d), 616 (C. C. A. 8th); *United States v. Stack,* 62 F. (2d), 1056 (C. C. A. 4th), but with equal uniformity of decision have held such condition does not of itself mature a contract of insurance against total disability "reasonably certain * * * (to) continue throughout the life of the person suffering from it." (Treasury Decision No. 20, *supra.*)

In the case of United States v. Messinger, 68 F. (2d), 234 (C. C. A. 4th) it was said by Judge Parker (p. 237):

> "To say that a man who has an arrested case of tuberculosis, or a case which can be arrested with proper treatment, is totally and permanently disabled, because he cannot do heavy labor or work amid all conditions, is to adopt a theory contrary to human experience and one which has been repudiated by the courts in a practically unbroken line of decisions. See particularly *Ivey v. United States* (C. C. A. 4th) 67 F. (2d) 204; *United States v. Diehl, supra; United States v. Rosborough* (C. C. A. 4th) 62 F. (2d) 348; *United States v. Stack, supra; Eggen v. United States* (C. C. A. 8th) 58 F. (2d) 616, 620."

A further list of cases denying recovery on a contract of war risk insurance for merely incipient tuberculosis is set out in the footnote below.*

**Nicolay v. United States,* 51 F. (2d) 170, 173 (C.C.A. 10th); *Hirt v. United States* 56 F. (2d) 80, 82 (C.C.A. 10th; *Roberts v. United States,* 57 F. (2d) 514 515 (C.C.A. 10th); *Eggen v. United States,* 58 F. (2d)

In many respects the instant case is analogous to *United States v. Rentfrow, supra,* cited with approval by this Court in *Falbo v. United States,* 64 F. (2d), 948 (C. C. A. 9th), in which it is said (p. 489):

> "There is evidence sufficient to support the trial court's finding that the insured was suffering from pulmonary tuberculosis when he was discharged from the Army. There is no evidence, however, of the permanence of the disability. The only direct evidence on the subject is that of Dr. Calhoun, who testified that in 1922 his condition was not a permanent one, and that the disease would probably have been arrested if the insured had followed the treatment suggested. It is suggested by appellees that liability exists unless the evidence affirmatively discloses that the condition was not a permanent one. We are cited to *Humble v. United States,* 49 F. (2d) 600, 601, where the District Court allowed a recovery because it was 'impossible to say that the disease would

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616, 618-619 (C.C.A. 8th); *United States v. Rentfrow,* 60 F. (2d) 488, 489 (C.C.A. 10th; *Garrison v. United States,* 62 F. (2d. 41, 42 (C.C.A. 4th; *United, States v. Diehl,* 62 F. (2d) 343 (C.C.A. 4th); *United States v. Rosborough,* 62 F. (2d) 348 (C.C.A. 4th); *United States v. Peters,* 62 F. (2d) 977, 980 (C.C.A. 8th); *United States v. Stack,* 62 F. (2d) 1056 (C.C.A. 4th); *United States v. Thompson,* 63 F. (2d) 111 (C.C.A. 4th), certiorari denied, 289 U. S. 758; *Andrews v. United States,* 63 F. (2d) 184 (C.C.A. 8th); *Walters v. United States,* 63 F. (2d) 299, 301 (C.C.A. 5th); *Mason v. United States,* 63 F. (2d) 791, 793 (C.C.A. 2nd); *United States v. Hodson,* 64 F. (2d) 119 (C.C.A. 8th); *McCleary v. United States,* 64 F. (2d) 1016 (C.C.A. 9th), certiorari denied 1-15-34; *United States v. Harrell,* 66 F. (2d) 231, 233 (C.C.A. 10th); *United States v. Younger,* 67 F. (2d) 149 (C.C.A. 4th); *Ivey v. United States,* 67 F. (2d) 204 (C.C.A. 4th); *Denning v. United States,* 68 F. (2d) 23 (C.C.A. 2d); *Prevette v. United States,* 68 F. (2d) 112 (C.C.A. 4); *United States v. Gwin,* 68 F. (2d) 124 (C.C.A. 6th); *United States v. Messinger,* 68 F. (2d) 234 (C.C.A. 4th); *Huffman v. United States,* 70 F. (2d) 266 (C.C.A. 4th); *United States v. Lancaster,* 70 F. (2d) 515 (C.C.A. 4th); *Puckett v. United States,* 70 F. (2d) 895 (C.C.A. 5th); *United States v. McShane,* decided May 9, 1934 (C.C.A. 10th).

not continue active for the rest of his life.' But the burden of proof is upon the plaintiff to prove that the disability was permanent, that is, 'founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.' This burden is not carried by leaving the matter in the realm of speculation. * * *

"Such cases as these, which are as frequent as they are unfortunate, make a strong appeal to the sympathies. An incipient tubercular stands at a crossroads: If he continues his ordinary activities, his condition is a hopeless one. On the other hand, if he will follow a program of complete rest and wholesome nourishment for an indicated period, the chances are strongly in favor of an arrested condition and a substantial cure. Many times the choice is a hard one, particularly when the economic circumstances of the insured are considered. But we cannot believe that liability upon these contracts of insurance should be determined by the conduct of the insured after the policy has lapsed, nor by economic circumstances which may influence that conduct. We can find no support, in this record, for a finding that the tuberculosis with which insured was afflicted had progressed to the incurable stage when his policy lapsed in August, 1919. For that reason, the motion of the government should have been sustained. For a strikingly similar case, see *Eggen v. United States* (C. C. A. 8) 58 F. (2d) 616."

The record does not show that plaintiff has made any real effort to effect a cure of his condition, unless the discontinuance of many jobs of intermittent character because "too sick to work, hours too

long" (R. 26) or "on account of weakened condition" (R. 23) and abandonment of vocational training "of his own accord" after seventeen or eighteen days (R. 28) may be so considered, and neglect of his condition is shown by his testimony that he was AWOL (absent without leave) from Government hospitals (R. 26); that he was dismissed from a Government hospital for drunkenness (R. 27); and from another on a charge of drunkenness (R. 26); that he was arrested for drunkenness at Yakima "approximately twenty times" (R. 28). The record is replete with testimony of plaintiff's drinking (R. 28, 71, 72, 21, 25, 27, 33, 34, 69, 70).

In *Eggen v. United States,* 58 F. (2d) 616 (C. C. A. 8th), it is said (p. 620):

> "* * * an insured may not convert a total temporary disability existing before lapse into a total permanent disability by neglecting his condition after lapse, and the failure to take treatment may destroy whatever probative value death or permanency of disability occurring after lapse would otherwise have."

And to the same effect are *United States v. Galloway,* 62 F. (2d) 1057 (C. C. A. 4th); *Walters v. United States,* 63 F. (2d) 299 (C. C. A. 5th); *United States v. Ivey,* 64 F. (2d) 653 (C. C. A. 10th); *United States v. Rentfrow,* 60 F. (2d) 488 (C. C. A. 10th); *United States v. McCaulley,* 68 F. (2d) 370

(C. C. A. 7th); *United States v. Hill,* 62 F. (2d) 1022 (C. C. A. 8th).

The long and unexplained delay in the assertion of claim (R. 4-5) is strong evidence that plaintiff was not totally permanently disabled during the life of the insurance contract (*Lumbra v. United States,* 290 U. S. 551) and plaintiff's reliance upon the testimony of physicians who did not examine him prior to the year 1930 (R. 35, 46, 51, 55) illustrates the speculative character of his evidence. Excluding as privileged factual medical testimony relating to earlier years, plaintiff relied upon physicians employed on a contingent fee basis (R. 47, 58) who had testified in many like cases (R. 47, 57). The years between February 2, 1919 and 1930 are inadequately bridged, for although alleging total permanent disability more than fourteen years prior to the trial, plaintiff not only failed to call available medical witnesses familiar with his condition in the years before 1930 (Cf. *United States v. Blackburn,* 33 F. (2d) 564 (C. C. A. 9th) who might have supported any just claim, but endeavored successfully to exclude the testimony of such witnesses. His evidence is speculative, (Cf. *United States v. Kerr,* 61 F. (2d) 800 (C. C. A. 9th); *United States v. Koskey,* decided June 11, 1934 (C. C. A. 9th); *United States v. Hill,* 62 F. (2d) 1022 (C. C. A. 8th) and plaintiff has wholly failed to meet the requirement of substantial evidence of permanence. *Falbo*

v. United States, 64 F. (2d) 948 (C. C. A. 9th) affirmed, 291 U. S. 646; *United States v. Rentfrow,* 60 F. (2d) 488 (C. C. A. 10th); *Eggen v. United States,* 58 F. (2d) 616 (C. C. A. 8th).

II.

THE COURT ERRED IN THE ADMISSION OF TESTIMONY BY WITNESSES QUALIFIED ONLY AS PHYSICIANS THAT PLAINTIFF WAS TOTALLY PERMANENTLY DISABLED.

Plaintiff's medical witnesses should not have been permitted to invade the province of the jury and express opinions concerning the ultimate question to be determined by the trial. *Prevette v. United States,* 68 F. (2d) 112 (C.C.A. 4th); *Miller v. United States,* decided June 8, 1934 (C.C.A. 5th); *United States v. Matory,* decided June 21, 1934 (C.C.A. 7th); *Harris v. United States,* 70 F. (2d) 889 (C.C.A. 4th).

The reasons for the exclusion of such testimony are stated by the Fourth Circuit in a per curiam opinion (*United States v. Sauls,* 65 F. (2d) 886, 887) as follows:

> The witness was asked the question: "I ask you Mr. Iseley, from your observation of him, whether or not, in your opinion, since you first

knew him, in 1923, up to now, he has been able to engage continuously in any gainful occupation?" And he answered: "No, sir, his physical condition was such he could not."

We think that this question and answer were clearly objectionable, in that they invaded the province of the jury, and that this objection is valid irrespective of whether the witness be a lay witness or an expert. The ultimate question on the totality of disability was whether plaintiff was able to follow continuously a substantially gainful occupation. What is meant by continuously in the regulations construing a war risk policy is a question of law. See *Carter v. U. S.* (C. C. A. 4th) 49 F. (2d) 221. The same is true as to what is to be deemed a gainful occupation under these regulations. The question permitted the witness to settle these questions of law for himself, and, applying this law to the facts within his knowledge, to try the very question which the jury had been impaneled to try. This should not be permitted. *Spokane & I. E. R. Co. v. United States,* 241 U. S. 344, 36 S. Ct. 668, 60 L. Ed. 1037; *National Cash Register Co. v. Leland* (C. C. A. 1) 94 F. 502; *Safety Car Heating & Lighting Co. v. Gould Coupler Co.* (C. C. A. 2) 239 F. 861, 865; *Castner Electrolytic Alkali Co. v. Davies* (C. C. A. 2) 154 F. 938, 942; *Standard Fire Extinguisher Company v. Heltman* (C. C. A. 6) 194 F. 400, 401; *Smith v. Board of Commissioners of Lexington,* 176 N. C. 477, 97 S. E. 378; *Ker-*

ner v. Southern Ry. Co., 170 N. C. 94, 97, 86 S. E. 998; *Deppe v. Atlantic Coast Line R. Co.*, 154 N. C. 523, 524, 70 S. E. 622; *Phifer v. Carolina Cent. R. Co.*, 122 N. C. 940, 29 S. E. 578; *Marks v. Harriet Cotton Mills*, 135 N. C. 287, 47 S. E. 432; 22 *Corpus Juris*, 502, and cases there cited.

The further objection to such testimony was promptly made (R. 40) that the hyopthetical question upon which it was based did not fairly set out the matters in evidence. The hypothetical question wholly ignored the plaintiff's neglect of medical treatment (R. 26) and conduct inimical to cure (R. 26, 27) established by plaintiff's own testimony although the Courts have clearly stated that consideration must be given to such factors in determining the essential element of permanence. *Eggen v. United States*, 58 F. (2d) 616 (C. C. A. 8th); *United States v. Rentfrow*, 60 F. (2d) 488 (C. C. A. 10th); *United States v. Galloway*, 62 F. (2d) 1057 (C. C. A. 4th).

CONCLUSION

It is respectfully submitted that the judgment for plaintiff rests upon speculative evidence; that there is no substantial evidence of the permanence of total disability during the life of the contract; that the Court erred in admitting opinion testimony upon

the ultimate question to be determined by the trial; and that the judgment herein should be reversed.

JAMES M. SIMPSON,
United States Attorney.

WILL G. BEARDSLEE,
Director, Bureau of
War Risk Litigation.

WILBUR C. PICKETT,
Special Assistant to
the Attorney General.